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In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 628

EVERETT ANDERSON,
Petitioner,

VERSUS

THE STATE OF OKLAHOMA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

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October, 1968

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In the
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THE STATE OF OKLAHOMA,
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PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

Petitioner prays that a Writ of Certiorari be issued to review the judgment of the Court of Criminal Appeals of Oklahoma entered in the above cause on July 17, 1968. Petition for Rehearing was denied on July 31, 1968. Judgment is final.

OPINION BELOW

The opinion of the Court of Criminal Appeals is reported in 444 P.2d 239 and is attached hereto as Appendix "A".

JURISDICTION

(1) The judgment of the Court of Criminal Appeals of Oklahoma was entered July 17, 1968. A Petition for Rehearing, timely filed, was denied on

July 31, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. 1257(2), (3) and Rule (19) of the Supreme Court of the United States.

(2) The arrest, search and seizure issue was raised in a motion to suppress evidence (R. 6), at the trial level (R. 267), in Defendant's Petition in Error to the court below (R. 319), in Defendant's brief in the court below (R. 320), and in Defendant's Notice of Appeal to this Court (R. 356, 357).

QUESTION PRESENTED

Was not the arrest of the Defendant illegal and the incident search of his automobile for evidence with which to convict him invalid?

STATUTORY PROVISIONS INVOLVED

1. Title 22 Oklahoma Statutes Section 196 (A. v). the United States (A. vi).

CONSTITUTIONAL PROVISIONS INVOLVED

1. The Fourth Amendment to the Constitution of the United States (A. vi).
2. The Fourteenth Amendment to the Constitution of the United States (A. vi).

MUNICIPAL ORDINANCE PROVISIONS INVOLVED

1. Title 21, Ordinances of the City of Oklahoma City, Section 21.5.05 (A. vi).

STATEMENT OF THE CASE

At 4:45 a.m., on September 16, 1966 (R. 106), Everett Anderson, a businessman and resident of Wichita, Kansas (R. 56), was riding as a passenger in an automobile owned by him (R. 77) and driven at his direction by an employee of his (R. 85), Ray Dean Austin (R. 108). The automobile was being driven in a northerly direction (R. 106) at approximately 25 miles per hour (R. 18) in the 2600 block of North Eastern Avenue in Oklahoma City, Oklahoma County, Oklahoma (R. 130). Eastern Avenue is a four-lane street having two north-bound and two south-bound lanes for traffic (R. 131). The driver of the automobile made a right turn into a service station driveway, *not located at a street intersection* (R. 107). There were no other automobiles in the vicinity of Defendant's automobile at the time of the turn into the service station driveway (R. 125), nor did the turn present any hazard to surrounding traffic (R. 126) nor was it a reckless driving maneuver (R. 125).

As the automobile proceeded in a southerly direction it was stopped (R. 108, 133) by Officer C. R. Acox of the Oklahoma City Police Department (R. 105) and Agent James Rose (R. 107) of the Narcotics Bureau of the United States Treasury Department (R. 129). Prior to stopping the automobile Officer Acox and Agent Rose had been sitting on certain locations watching for narcotic traffic violations (R. 203). Neither Officer Acox (R. 106) nor Agent Rose (R. 130) had ever seen the Defendant, the driver, or the automobile prior to observing them a moment before stopping it. The officers were approximately one block behind Defendant's automobile at the time the turn was made into the service station driveway (R. 131).

Officer Acox sounded the siren of the detective cruiser (R. 108) as Defendant's automobile proceeded in a southerly direction after turning through the service station driveway and the driver immediately pulled over and stopped (R. 108). Except for the right turn into the service station driveway (R. 106), Officer Acox had no reason whatsoever to arrest the driver or Defendant (R. 120), and if the turn were not a violation of the Traffic Ordinances of the City of Oklahoma City, then Officer Acox had no reason to stop the automobile (R. 123). He was not enforcing state traffic laws at the time he was on duty (R. 123) nor did he have a warrant for their arrest (R. 120). Nor did he have any reason to suspect that the automobile was carrying any narcotics (R. 127).

Agent Rose assisted in the stopping of Defendant's automobile and the arrest of the Defendant (R. 134). He had suspicions (R. 139) about a car of this type coming to Oklahoma City (R. 134) but had no license number with which to identify it and wasn't certain about this particular car (R. 139). He had no reason to arrest Defendant until after marihuana was found in the automobile (R. 132, 135).

As Defendant's automobile was stopped, Officer Acox approached it on the driver's side and Agent Rose approached the passenger side (R. 108). Officer Acox ordered the driver from the automobile, searched him, and asked for identification (R. 111), and told him he was under arrest for making a right turn (R. 112). No weapon was found on the driver (R. 111). Agent Rose ordered Defendant out of the passenger side of the automobile and did not tell Defendant why the automobile was stopped (R. 132).

As Officer Acox was asking the driver for identification, he—Acox—noticed a brown paper sack on the floorboard of the back seat on the driver's side. He could not see nor did he know at this time what was in the sack (R. 109). The sack was the first item searched (R. 111) and after opening it, Officer Acox found smaller sacks and a piece of wrapped-up newspaper (R. 110). After opening the smaller sacks, he found marihuana (R. 112) totalling approximately five ounces (R. 157). Officer Acox showed the marihuana to Agent Rose (R. 112). Agent Rose then identified himself and the driver and Defendant were placed under arrest for possession of marihuana (R. 112).

Officer Acox then conducted a thorough search of the automobile and its contents at the scene including the luggage, glove compartment, ash trays, seats, and trunk, but no other evidence of any marihuana was found (R. 113).

Defendant was charged by information in the District Court of Oklahoma County with POSSESSION OF MARIHUANA (R. 3) which charge was later amended to POSSESSION OF MARIHUANA AFTER FORMER CONVICTION OF A FELONY (R. 143), the former conviction being for RAPE IN THE SECOND DEGREE on June 19, 1950 (R. 146). A District Court jury found him guilty of POSSESSION OF MARIHUANA and fixed his punishment at two years in the penitentiary (R. 270). No Federal charges were filed as a result of the arrest.

Defendant's Motion to Suppress Evidence (R. 6), *i.e.*, approximately five ounces of marihuana, was overruled to which ruling Defendant excepted (R. 142a). The evidence was introduced at the trial over Defendant's objection (R.

224). The objection was preserved by demurrer, motion to suppress, and motion for directed verdict of not guilty (R. 267), all of which were overruled by the trial court (R. 267).

REASONS FOR GRANTING THE WRIT

PETITIONER'S CONSTITUTIONAL PROTECTION AGAINST UNREASONABLE SEARCHES AND SEIZURES WAS VIOLATED WHEN THE COURT BELOW UPHELD AN UNREASONABLE SEARCH AFTER AN UNLAWFUL ARREST.

This case involves the validity of a search of Defendant's automobile, in which he was a passenger, following the arrest of its driver for alleged violation of a municipal ordinance. It involves the construction of an ordinance.

The driver of Defendant's automobile was arrested solely for the alleged violation of an ordinance of the City of Oklahoma City, Oklahoma (R. 120). The city police officer testified that if the right turn of Defendant's automobile were not a violation of a city ordinance then he would have no cause to arrest the driver (R. 123). Federal Agent Rose testified that he had no cause to arrest Defendant until after the city police officer discovered contraband in Defendant's automobile (R. 132, 135).

The rules governing arrests without warrants extant in Oklahoma are statutory and Defendant argues that if his arrest was illegal then the search of his automobile incident to his arrest was unlawful and therefore unreasonable.

Title 22 Oklahoma Statutes Section 196, provides:

"A peace officer may, without a warrant, arrest a person:

1. For a public offense committed or attempted in his presence.
2. When the person arrested has committed a felony, although not in his presence.
3. When a felony has in fact been committed, and he has reasonable cause for believing the person arrested to have committed it.
4. On a charge, made upon reasonable cause, of the commission of a felony by the party arrested."

No allegation was ever made by the officers that a felony was committed or that they had any cause to believe that a felony had been committed.

Since the city police officer was not enforcing state traffic laws (R. 123) he could only base the arrest on an alleged violation of a city ordinance. The city police officer testified in detail the proper method of making a right turn, however the Traffic Ordinances of the City of Oklahoma City (R. 172A) require that:

"The driver of a vehicle intending to turn at an intersection shall do so as follows:

"(a) Right turns.—Both the approach for a right turn and the execution of right turn shall be made as close as practicable to the right hand curb or edge of the roadway."

Applying the state requirement for an arrest without a warrant and the municipal requirement of the proper

method of making turns in automobiles, the arrest cannot be supported as lawful and the incident search legal and reasonable.

The judgment below holding the search valid begs the issue of whether or not any offense for which an arrest could be made was actually committed in the presence of the arresting officer. Resolution of the question then turns not on whether the search was reasonable but whether or not the arrest was legal.

The principal is firmly established that for a warrantless search incident to an arrest to be valid the initial arrest itself must be legal.

The "validity of search without warrant incident to an arrest is dependent initially on a valid arrest." *U. S.* v. *Rabinowitz*, 70 S.Ct. 430, 339 U.S. 56, 94 L.Ed. 653 (1950).

The court below in holding that the search of Defendant's automobile was reasonable, failed to make a determination that a valid arrest had preceded the search. The court thus avoided the question raised in Defendant's appeal brief, *i.e.*, "whether the arrest of Defendant by officers was in good faith or was [it] merely a subterfuge to search his automobile and secure evidence with which to convict him." The court concluded only that Defendant had committed a misdemeanor in the presence of the arresting officer and that the subsequent search was valid. By no construction of the city traffic ordinance, the alleged violation for which the driver of Defendant's automobile was arrested, can the arrest be justified. No ordinance prohibits the turn for which the driver was arrested, even though the arresting officer in good faith might view the

turn as a violation. Nor is "good faith on the part of arresting officers . . . enough." If subjective good faith alone were the test, the protections of the Fourth Amendment would evaporate, and the people would be "secure in their persons, houses, papers and effects" only in the "discretion of the police." *Beck* v. *Ohio*, 379 U.S. 89, 13 L.Ed.2d 142, 85 S.Ct. 223 (1964). Indiscriminate stopping of automobiles for pretended or imagined violations of city ordinances and conducting a general search of the automobile to secure evidence with which to convict occupants reduces Fourth Amendment protection to nothing more than grade-school idealism. That such conduct on the part of police officers is prohibited as stated in *Brinegar* v. *U. S.*, 69 S.Ct. 1302, 338 U.S. 160, 93 L.Ed. 1879 (1949) when this Court stated that "user of public highway may not be stopped and searched at officers' whim, caprice, or mere suspicion."

CONCLUSION

For the foregoing reason and based on the foregoing authorities, Petitioner respectfully requests this Court to grant the Petition for Certiorari to the Court of Criminal Appeals of the State of Oklahoma.

Respectfully submitted,

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Oklahoma City, Oklahoma 73102
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October, 1968

APPENDIX A

FILED
in Court of Criminal Appeals
State of Oklahoma
July 17 1968
Andy Payne
Clerk

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

EVERETT ANDERSON,	)	
	)	
Plaintiff in Error,	)	
	)	
vs.	)	No. A-14,444
	)	
THE STATE OF OKLAHOMA,	)	
	)	
Defendant in Error.	)	

— SYLLABUS —

1. Where an officer sees a person violating the law in his presence, where the officer has legal right to be, he may without a warrant arrest such a person and search him together with the immediate surroundings without the necessity of search warrant.

2. Where a misdemeanor is committed in the presence of an officer, he has the right to arrest the offender without a warrant. If the arrest is not a subterfuge, and is in good faith, the defendant and his immediate possessions may be lawfully searched.

[APPENDIX]

3. Whether search of, and seizure from, an automobile upon a public highway, without a search warrent, is reasonable, is, in its final analysis, to be determined as a judicial question, in view of all the circumstances under which it is made.

AN APPEAL FROM THE DISTRICT COURT OF OKLAHOMA COUNTY, OKLAHOMA, HONORABLE A. P. VAN METER, JUDGE.

Everett Anderson was convicted of the crime of Possession of Marijuana, and appeals. AFFIRMED.

LEON E. TABOR, OKLAHOMA CITY, OKLAHOMA
ATTORNEY FOR PLAINTIFF IN ERROR.

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Attorneys for Defendant in Error.

OPINION BY NIX, P. J.
BUSSEY, J., AND TOM
BRETT, J., CONCUR

NIX, PRESIDING JUDGE:

Everett Anderson, hereinafter referred to as the defendant, was arrested in the early morning hours (4:45 A.M.) while driving a 1963 Thunderbird in the 2600 blk. on North Eastern Avenue in Oklahoma City. He was charged with Possession of Marijuana, tried before a jury, found guilty, and his punishment set at 2 years in the penitentiary. Defendant perfected his appeal to this Court asserting that the evidence was obtained by an illegal search and seizure and the Motion to Suppress should have been sustained.

The arrest in question came about in the following manner, as testified to by C. R. Acox, the arresting officer:

"A He was in the lane next to the center line. He came to 26th and Eastern and he made a right turn from the wrong lane of traffic and turned into a service station driveway.

Q What did he do then?

A He turned around and started on back south—correction—yeah, south on Eastern.

Q Was there anyone else in the car with him?

A Yes, sir, it was driven by another man.

Q All right. What was his name?

A Ray Austin.

Q All right. What did you do then?

A Stopped the vehicle and arrested the driver.

Q For what?

A For making an improper right turn."

This Court has held in Hodge v. State, Okl.Cr. 258 P2d 215, that:

"Where an officer sees a person violating the law in his presence where the officer has a legal right to be, he may without a warrant arrest such a person and search him together with the immediate surroundings without the necessity of search warrant."

The defendant claims the arrest and following search were illegal because the traffic ciolation was used as a subterfuge for the arrest. The only evidence that causes the Court alarm in this regard was the fact that a Federal Narcotics Agent was with the arresting officer, and they were looking for a similar car. *It always creates suspicion in the Court's mind when a FEDERAL AGENT is with a City Officer in making an* arrest for a traffic violation, and finding contraband.

However, in the instant case, a traffic violation occurred in the presence of the officer, and defendant was stopped and arrested for same.

In King v. State, Okl.Cr. 357 P2d 230, this Court Said:

"Officers may station themselves at street or Highway intersections or other public places, for the purpose of observing motorists who may be possible law violators, and may, without a warrant, lawfully arrest such motorists as may violate the law in the presence of such officers."

The search and seizure made in connection with the arrest was sustained by the trial court.

The officer testified that after the arrest, the car doors were open and the interior light on. He noticed a paper sack was in the floorboard, plainly visible, and partly open. The officer further testified he thought it may have contained some kind of a weapon. Upon opening the sack more fully, he detected the sacks of marijuana.

This Court has held in numerous cases that:

"Where a misdemeanor is committed in the presence of an officer, he has the right to arrest the offender without a warrant. If the arrest is not a subterfuge, and is in good faith, the defendant and his immediate possessions may be lawfully searched."

Franklin v. State, Okl. Cr. 281 P2d 204.

This Court has held that the immediate area may be searched in connection with a lawful arrest, for weapons as a precautionary measure for the safety of the arresting officer. See, Brinegar v. State, Okl.Cr. 262 P2d 464; Scott v. State, Okl.Cr. 180 P2d 196, 84 Okl.Cr. 71.

In the Scott case, supra, it was held that;

"Whether search of, and seizure from, an automobile upon a public highway, without a search warrant,

is reasonable, is, in its final analysis, to be determined as a judicial question, in view of all the circumstances under which it is made."

It is by this yardstick that we have considered the question involved, and in view thereof, have concluded that the judgment and sentence should be affirmed, and it is so ordered.

BUSSY, J. AND TOM
BRETT, J., CONCUR

APPENDIX B

STATUTORY PROVISIONS INVOLVED

Title 22 Oklahoma Statutes, Section 196.

"A peace officer may, without a warrant, arrest a person:

1. For a public offense, committed or attempted in his presence.
2. When the person arrested had committed a felony, although not in his presence.
3. When a felony has in fact been committed, and he has reasonable cause for believing the person arrested to have committed it.
4. On a charge, made upon reasonable cause, of the commission of a felony by the party arrested."

[APPENDIX]

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment to the Constitution of the United States

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The Fourteenth Amendment to the Constitution of the United States

> "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

MUNICIPAL ORDINANCE PROVISIONS INVOLVED

The Traffic Code of Ordinances of the City of Oklahoma City, in pertinent part (R 177a, b)

Title 21, Chapter 5, Section 21.5.05

> "Position and Method for turning. The driver of a vehicle intending to turn at an intersection shall do so as follows:
>
> "(a) Right turns.—Both the approach for a right turn and the execution of right turn shall be made as close as practicable to the right hand curb or edge of the roadway."